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No. 320

IN THE

SUPREME COURT OF THE UNITED STATES

PERRY J. OWENS, *Petitioner*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

1. When the jury finds that the Defendant in an FELA case was not negligent, can the Plaintiff on appeal contend that there is no evidence to support this finding when the Plaintiff has not filed a motion for instructed verdict in the Trial Court?

2. When the jury finds that the Defendant in an FELA case was not negligent, can the Plaintiff on appeal contend that there is no evidence to support this finding when the Plaintiff has not objected to that portion of the charge submitting acts of negligence on the part of Defendant?

3. Is there evidence to support the finding of the jury that Defendant was not negligent?

STATEMENT OF THE CASE

This case was brought by Petitioner, Perry J. Owens, against Respondent, The Atchison, Topeka and Santa Fe Railway Company, under the Federal Employers Liability Act (FELA) to recover damages for alleged injuries sustained while working with a rivet gang repairing a pulpwood car at Respondent's railroad yards in Cleburne, Texas. The car was supported by tripods while being repaired. The wood flooring of the car had been removed so that only the metal beams remained across the floor of the car. The rivet gang was driving rivets into the exposed metal beams. After a heated rivet was placed in a hole in one of the beams, it was Petitioner's job to push the rivet up into the hole and clamp it. Another employee, John Johnson, then would drive the rivet from the other side of the beam to form a head on the rivet and lock it firmly into place. Petitioner was injured while on his knees underneath the elevated car clamping the rivets. Johnson, who stood above him on a metal beam driving the rivets, attempted to cross from one side of the beam to the other and lost his footing, falling on Petitioner (Tr. 31).

Petitioner alleged three acts of primary negligence on the part of Respondent and the jury in response to special issues found that Respondent was not negligent. The only one of these alleged acts of negligence of importance is the one wherein the jury found that Johnson was not negligent in losing his footing and falling upon Petitioner, as it is the finding on this

act of negligence that Petitioner contends is not supported by the evidence. In addition to these acts of primary negligence, the Court submitted to the jury several acts of contributory negligence on the part of the Petitioner and the jury also found that Petitioner had not been negligent.

Petitioner appealed to the Court of Appeals for the Fifth Circuit contending primarily that there was no evidence to support the jury's finding that Johnson was not negligent in falling on him. The Court of Appeals affirmed, holding that Petitioner had failed to preserve the point for appeal because at the trial he had failed to attack the sufficiency of the evidence in any manner available to him. *Owens v. The Atchison, Topeka and Santa Fe Ry. Co.*, 393 F.2d 77 (5th Cir. 1968).

REASONS FOR DENYING THE WRIT

I.

This Court has clearly stated in Rule 19, Supreme Court Rules, that a writ will be granted only where there are special and important reasons therefor. Petitioner has failed in this regard in that the decision of the Court of Appeals in this case does not fall within any of the reasons stated in Rule 19(b), Supreme Court Rules.

II.

Petitioner failed to file a motion for a directed verdict in accordance with Rule 50(a), Federal Rules of Civil Procedure, and accordingly is in no position now to contend that there is no evidence to support the finding of the jury that Respondent was not negligent. See *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967); *Powers v. Gilmour*, 297 F.2d 138 (5th Cir. 1961); *Pennsylvania National Mutual Casualty Ins. Co. v. Nathan*, 361 F.2d 18 (5th Cir. 1966); *Home Insurance Co. of New York v. Davila*, 212 F.2d 731 (1st Cir. 1954); *Muryn v. New York Central R.R.*, 270 F.2d 645 (2d Cir. 1959) (per curiam), cert. denied, 362 U.S. 918 (1960); *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965); *Pruett v. Marshall*, 283 F.2d 436, 438 (5th Cir. 1960); *Southern Ry. Co. v. Miller*, 285 F.2d 202, 206 (6th Cir. 1960); *Charles v. Norfolk & Western Ry. Co.*, 188 F.2d 691, 692 (7th Cir.), cert. denied, 342 U.S. 831 (1951); *Tsai v. Rosenthal*, 297 F.2d 614, 618 (8th Cir. 1961); *Zimmerman v. Emmons*, 225

F.2d 97, 99 (9th Cir. 1955), cert. denied, 350 U.S. 932 (1956); and *Brown v. Poland*, 335 F.2d 984, 985, 986 (10th Cir. 1963).

III.

The Charge of the Court submitted to the jury the issues of whether Respondent was guilty of acts of negligence. If there was no evidence warranting the submission of such issues, Petitioner was required by Rule 51, Federal Rules of Civil Procedure, to object to the Charge asserting such contention. Having failed to object, Petitioner is now in no position to challenge the sufficiency of the evidence to support the jury's verdict. See *Berman v. Palatine Ins. Co.*, 379 F.2d 371 (7th Cir. 1967); *Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748 (8th Cir. 1966); *Stokes v. Continental Assurance Co.*, 242 F.2d 893 (5th Cir.), cert. denied, 355 U.S. 890 (1957); and *Boudreaux v. Mississippi Shipping Co.*, 222 F.2d 954 (5th Cir. 1955).

IV.

Even if the Petitioner had preserved his right to complain about the sufficiency of the evidence, this Court should deny the writ because the finding of the jury is supported by the evidence. This Court has made it clear in *Rogers v. Missouri Pac. Co.*, 352 U.S. 500 (1957) and subsequent decisions, that the fact finding function on negligence should be left to the jury in all but the infrequent cases where fairminded jurors could not honestly differ.

This principle concerning the significance of the

jury's verdict applies, of course, with equal force in all FELA cases, no matter whether the jury happens to decide in favor of the employee or employer. Thus, while it is true that a majority of Supreme Court decisions have dealt with findings of negligence in favor of the plaintiff, the same principles expressed therein obviously apply in the instant case in which the jury returned a finding of no negligence in favor of the employer. Hence, the jury's verdict must stand unless Petitioner is able to show that this is one of those extremely infrequent cases in which there is a complete absence of probative facts to support the conclusion reached by the jury.

A brief summary of the evidence presented on the issue of negligence shows that the jury was fully warranted in concluding that Petitioner failed to prove his injury was caused by any negligence on the part of Respondent. At the outset, it should be noted that with regard to the sufficiency of the evidence, Petitioner limits his complaint to a narrow point. He attacks the sufficiency of the evidence *only* with regard to the question whether John Johnson was negligent in losing his balance and falling on Petitioner.

Petitioner's testimony revealed evidence from which the jury could easily conclude that neither Johnson nor Respondent was negligent. Petitioner stated by deposition that Johnson "just accidentlly got overbalanced and fell on top of me." (Tr. 57). He conceded there was enough open space in the floor of the car to have allowed him to see John Johnson if he had looked up. (Tr. 52). Significantly, Petitioner did not know of

anything Respondent could have done to avoid the accident. (Tr. 57). Surely the jury was warranted in taking Petitioner's own statements, the truth of which he never denied, at face value.

Bill Glenn, called by Petitioner, testified merely that John Johnson had fallen upon Petitioner (Tr. 72-73). Glenn did not testify as to any negligence by Petitioner or Johnson in any respect. (Tr. 66-75).

The testimony of John Johnson (Tr. 75-103) created several factual disputes which were resolved by the jury against Petitioner. John Johnson testified on the one hand that the heat from the rivets had caused his goggles to fog up; on the other, on cross-examination he stated that notwithstanding the fogging up of his goggles, he nevertheless could see through them. (Tr. 89, 97). While on the one hand he stated he did not believe he had looked where he was stepping, on the other he said he was familiar with the flooring of the car and knew where the beams were because he had been performing the same job for some time. (Tr. 96). He stated it was necessary for him to go over the beam when changing positions rather than under it. (Tr. 101). And in a report which he filed with Respondent, his employer, he stated he had lost his balance and fallen on top of Petitioner.

These factual disputes presented an evidentiary case for the jury. It was up to the jury to decide the extent to which John Johnson could see through his goggles and whether it was necessary for adequate vision that they be absolutely clear; whether he was negligent in not looking where he stepped or whether

a reasonable man who was familiar with the area also would not have looked down with each step; whether it was reasonable for him to stay on top of the beam while changing positions rather than going underneath it; and whether it was Respondent's negligence which had caused the fall or whether it was merely a case of a man who lost his balance while working under reasonably safe conditions.

In short, Petitioner's evidence of negligence was extremely weak, and yet he requests the Court to render the drastic and unusual holding that there was negligence as a matter of law. This request has no basis either in law or in fact. Under the circumstances of this case, it would be "an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, 327 U.S. 645, 652 (1945).

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT

I.

Petitioner in his Petition for Writ of Certiorari asserts that the decision of the Circuit Court in this case is directly in conflict with three decisions of the Court of Appeals for the Third Circuit. With regard to two of these cases, we shall only briefly discuss them as Petitioner does not discuss them at all. Both *Freifield v. Hennessy*, 353 F.2d 97 (3rd Cir. 1965) and *Atkinson v. Roth*, 297 F.2d 570 (3rd Cir. 1962), concern the right of a Circuit Court to consider error in the charge of the Court in view of the failure of Appellant to object to the charge and in both instances the Third Circuit held that an exception applied in that the error of the court in the charge was fundamental and a highly prejudicial error. The sufficiency of the evidence was not involved at all and clearly, the holding of the Court of Appeals in the instant case is not in conflict with these cases.

In *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996 (3rd Cir. 1968), the case was submitted to the jury by a general charge and the trial court instructed the jury both on primary negligence and contributory negligence. The Third Circuit concluded that there was no evidence warranting a charge on contributory negligence and therefore that the trial court had erred even though plaintiff had failed to object to the charge on this basis. There are two reasons why the opinion of the Fifth Circuit in this case is not in conflict with the holding of the Third Circuit in *Paluch v. Erie*

Lackawanna R.R., supra. First, the court in *Paluch* recognized that that case applied the sole exception to the general rule requiring an objection to the charge in order to obtain review on appeal of the sufficiency of the evidence. That exception is the rare instance where error is apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice. Otherwise, the Third Circuit follows the general rule and requires an objection to the charge as a predicate for review of the sufficiency of the evidence. See *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965). Second, in *Paluch*, the portion of the charge to which Plaintiff failed to object was the defensive issue of contributory negligence which was requested by Defendant. In the case now before this Court, that portion of the Charge to which Petitioner failed to object was the primary negligence issues which were requested by Petitioner himself. In other words, Petitioner is now before this Court stating that there was error in submitting to the jury the very primary negligence issues upon which Petitioner relied and which Petitioner requested that the Court submit to the jury.

We do not believe there is any conflict in the decision by the Circuit Court in this case and the decision of the Third Circuit in the *Paluch* case. However, if we should be wrong in this regard, and this Court should feel that the decision in the *Paluch* case should be followed, then this Court would still have to find that there was fundamental error in the decision of the District Court. This Court would also have to find that a jury could not properly find an absence of neg-

ligence on the part of Respondent. In the earlier part of this brief we have already summarized the evidence which clearly raised a fact issue so that no further discussion of that need be made. However, we do want to further discuss "fundamental error" and inquire as to what the fundamental error in this case would be. In the *Paluch* case, the fundamental error was the error of the District Court in charging the jury on the issue of contributory negligence and its diminishing effect upon any verdict it might find in favor of Appellant. In this case, Petitioner does not contend that the Trial Court erred in any respect. The Trial Court submitted the case to the jury just exactly the way Petitioner wanted it submitted to the jury so that his only complaint is to the finding by the jury. In order for any party to seek a reversal of a case, he must complain of some action of the Trial Court and yet in this case, we find no such complaint. Therefore, there can be no basis for reversal of the decision of the Trial Court and Circuit Court.

II.

Respondent certainly agrees with Petitioner when he states "Petitioner was not entitled to a directed verdict." However, the issue is not whether the Petitioner was entitled to a directed verdict, but whether Petitioner had to make a motion for directed verdict before he can complain on appeal that there was no evidence to support a finding by the jury. As indicated by the cases already cited (p. 4 of this brief), it is well decided that he must make such a motion. The fact that issues of fact were raised on contributory

negligence did not do away with the necessity for Petitioner to file a motion for directed verdict. Petitioner cites the case of *Fairmount Glass Works v. Cub Fork Coal Company*, 287 U.S. 474 (1932), in support of this contention but it is clear that a directed verdict was denied in that case for the reason that conflicting evidence had been presented on the issue of liability. In other words, a motion for directed verdict was actually made so that this case does not even come close to supporting the position of Petitioner.

III.

Petitioner asserts that there is confusion in the Circuit Courts because of their failure to recognize the distinction between "no evidence" and "sufficiency of the evidence". He fails to cite any case to show this confusion but the argument made by Petitioner indicates confusion only on the part of Petitioner. Apparently, Petitioner feels that "fundamental error" has occurred any time that a plaintiff in a FELA case loses. Perhaps this is unusual, but surely this Court is not going to back up on *Rogers v. Missouri Pacific Co.*, supra, simply because the jury has found for the defendant for a change. This Court has consistently held that the issue of negligence of the defendant is one of fact for the jury and not one of law for the Court.

IV.

Petitioner has received a fair trial and has no justification for accusing the Circuit Court of "pettifoggery." Petitioner asserts that Rules 50 and 51 of the

Federal Rules of Civil Procedure should not be applied to a case brought under the Federal Employers Liability Act, but the underlying reason is not clear. It is significant that Petitioner does not cite a single case supporting this view. The cases cited in Petitioner's brief, page 5, merely explain that contributory negligence by an employee does not completely bar his recovery under the Federal Employers Liability Act. However, the theory of comparative negligence is of no consequence in a case such as the one now before the Court where the employee is unable to prove any primary negligence on the part of his employer.

Petitioner asks the question in this part of the brief as to how Plaintiff can protect himself where he relies on more than one act of primary negligence. This is quite simple. Obviously, Petitioner is required to prove only one ground of negligence to recover, and if he believed that the evidence was such that the jury would not be entitled to return a finding of no negligence on Johnson's part, Petitioner should have asked the Court to direct a verdict in his favor on that issue, reliance on the other two grounds thereby becoming unnecessary. This is exactly what this Court prescribes should be done by Rule 50. But if the Trial Court had directed a verdict for Petitioner which was later reversed on appeal, Petitioner would have had to face a new trial. Thus, the choice between asking for a directed verdict or leaving the case to the jury is something of a gamble. And if in a doubtful case, a party chooses to leave his case to the jury, as the Petitioner did in this case, he should be bound by his choice. See *Stokes v. Continental Assurance Co.*, 242

F.2d 893 (5th Cir.), cert. denied, 355 U.S. 890 (1957).

V.

We believe that we have clearly shown to the Court that Petitioner presents nothing of importance in this Petition. The only thing unusual about this case is that the Plaintiff failed to win in an FELA case.

VI.

The appellate courts and the attorneys have already been given a tool by which they can assign errors in law created by a jury refusing to follow the evidence. These tools are prescribed in Rules 50 and 51 of the Federal Rules of Civil Procedure promulgated by this Court. If these rules are not followed by the parties practicing before the Court, then it is beyond the power of this Court or any other Court to help the parties.

CONCLUSION

This Respondent and most other railroads have argued many times in this Court that findings by a jury that the railroad was negligent were not supported by the evidence. Almost without exception, this Court has said that the question of negligence was to be decided solely by the jury. These cases are well known to the Court and in many of such cases, the inference of negligence was weak at best.

The Circuit Court in this case could easily have found that the finding of the jury was supported by the evidence and would have done so if it had gotten to that point. However, the Circuit Court very properly felt that this appeal should not have been filed in that Petitioner had failed to preserve any question for appeal insofar as the sufficiency of the evidence was concerned. The decision of the Circuit Court is therefore not based upon a technicality; it is based upon a very fundamental principle of appellate practice. This principle is that the appealing party must complain of some error on the part of the Trial Court.

In the absence of a motion for instructed verdict or objection to the charge, there is no error on the part of the Trial Court. The complaint of Petitioner therefore is not that the Trial Court erred, but that the jury erred. If a Trial Court asks the jury to decide whether a defendant was guilty of negligence under the evidence, the jury has not erred irrespective of whether it finds that there was or was not negligence. If there was no evidence to raise the issue of negligence or if the evidence proved negligence as a matter

of law, then the error committed was that of the Trial Court in even submitting the issue of negligence to the jury. Very properly, the Federal Rules of Civil Procedure and decisions of all courts require that this error be called to the attention of the trial court before the error is even made.

Otherwise, this Court and all appellate courts will be faced with appeals in every jury case based not on the error of the Trial Court, but based on the error of the jury in "refusing to follow the evidence or the law." This quotation, of course, is from the last sentence in Petitioner's Writ and shows the absurdity of the position of Petitioner. This is a typical statement of any losing party after a jury trial.

WHEREFORE, premises considered, Respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

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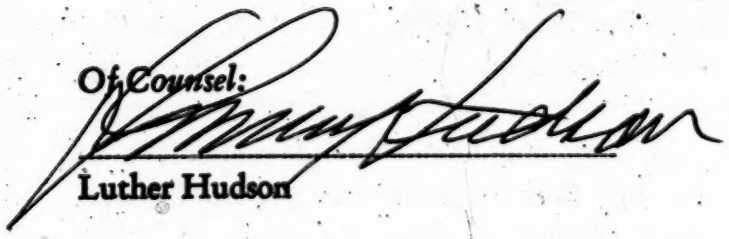

Luther Hudson

I certify that a copy of the foregoing Reply to Petition for Certiorari has been mailed on the 15 day of August, 1968 to Otto B. Mullinax, Mullinax, Wells, Mauzy, Levy & Richards, 1601 National Bankers Life Building, Dallas, Texas, Attorneys for Petitioner.

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